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Firos bin Abdul Jalil (as the administrator of the estate of Abdul Jalil bin Idrus (the deceased)) & Ors v Kewira Jaya Sdn Bhd & Ors

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02(IM)-2937–12 OF 2012

AZIAH ALI, ANANTHAM KASINATHER AND TENGKU MAIMUN JJCA

10 MAY 2013

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Civil Procedure — Pleadings — Amendment — Parties at liberty to make consequential amendments pursuant to court order — Amendment of statement of defence and counterclaim — Whether application to amend statement of defence and counterclaim bona fide — Whether application would change character of defence — Whether party to suit would be prejudiced — Whether judicial commissioner erred — Whether amendment to statement of defence and counterclaim ought to be allowed

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In the High Court, the appellants were the first to seventh defendants ('the seven defendants') while the first and second respondents were the plaintiffs. When the second respondent was added to the suit, the plaintiff's application to amend the statement of claim was allowed where the Court of Appeal made an order that the parties were at liberty to make consequential amendments arising from the addition of the second plaintiff. The third respondent was the eighth defendant in the court below. The plaintiffs alleged that the seven defendants had agreed to sell and the plaintiffs had agreed to purchase certain pieces of lands for a price of RM25,396,613.02. The eighth defendant acted as the solicitors for the seven defendants in the sale and purchase transaction. The plaintiffs then deposited RM2,539,661.30 being 10% of the purchase price to the eighth defendant as stakeholders but the seven defendants failed to execute the formal sale and purchase agreement ('SPA'). The plaintiffs then filed a suit in the High Court seeking, inter alia, for a declaration that the contract between the plaintiffs and the seven defendants was valid and for specific performance of the contract. Against the eighth defendant, the plaintiffs claimed for the interest of the 10% deposit. In the statement of defence and counterclaim, the seven defendants admitted that the eighth defendant represented them in the SPA and that the seven defendants accepted the offer made by the second plaintiff subject to the execution of a formal agreement. The seven defendants further pleaded that the formal agreement could not be executed as the parties could not agree on the final terms and conditions for the sale and purchase of the lands. After the statement of claim was amended, the seven defendants made an application to amend the statement of defence and counterclaim, seeking to raise an additional or alternative defence that the

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eighth defendant, as their solicitors, had no authority to receive and accept the second plaintiff's offer to purchase their land. The learned judicial commissioner ('JC') found that the application by the seven defendants to amend the statement of defence and counterclaim was not bona fide; would change the character of the defence and that it prejudiced the eighth defendant who would be exposed to a suit for professional negligence. Dissatisfied with the decision, the seven defendants filed the present appeal and submitted that the learned JC erred in not allowing the amendment to the statement of defence and counterclaim when the application to amend was predominantly consequential to the amendment made by the plaintiff to add the second plaintiff.

Held, dismissing the appeal with costs:

(1) There was no averment in the affidavit in support that the application was made consequent to the amendment of the statement of claim. Leave to amend the pleadings under O 20 of the Rules of Court 2012 was within the discretion of a judge which discretion must be exercised judiciously. In matters involving the exercise of a discretion, the appellate court would work on the presumption that the learned judge had rightly exercised the discretion and that the appellate court would not interfere unless it was satisfied that the discretion had been exercised on a wrong principle or that there had been a miscarriage of justice (see paras 9 & 11).

(2) The learned JC had applied the correct principles in the exercise of her discretion. Her Ladyship had considered the relevant questions in coming to her decision to dismiss the application. The amendment would change the character of the defence and the proposed amendment which was in respect of all the paragraphs except one, was not consequential (see paras 12–13).

[Bahasa Malaysia summary

Di Mahkamah Tinggi, perayu-perayu adalah defendan pertama hingga ketujuh ('ketujuh-tujuh defendan') sementara responden pertama dan kedua adalah plaintif-plaintif. Apabila responden kedua dimasukkan dalam tindakan, permohonan plaintif untuk meminda penyataan tuntutan dibenarkan di mana Mahkamah Rayuan membuat perintah bahawa pihak-pihak bebas untuk membuat pemindaan-pemindaan penting berbangkit daripada pemasukan plaintif kedua. Responden ketiga adalah defendan kelapan di Mahkamah Tinggi. Plaintif-plaintif mendakwa bahawa ketujuh-tujuh defendan telah bersetuju untuk menjual dan plaintif-plaintif bersetuju untuk membeli tanah tertentu untuk harga sejumlah RM25,396,613.02. Defendan kelapan bertindak sebagai peguamcara untuk ketujuh-tujuh defendan di dalam transaksi jual dan beli. Plaintif-plaintif kemudiannya mendepositkan wang sejumlah RM2,539,661.30 sebagai 10% daripada harga belian kepada

defendan kelapan sebagai pemegang amanah harta tetapi ketujuh-tujuh defendan gagal untuk melaksanakan perjanjian jual beli ('SPA') yang formal. Plaintif-plaintif kemudiannya memfailkan tindakan di Mahkamah Tinggi memohon, antara lain, untuk perisytiharan bahawa kontrak di antara plaintif-plaintif dan ketujuh-tujuh defendan adalah sah dan untuk pelaksanaan spesifik kontrak tersebut. Plaintif-plaintif menuntut terhadap defendan kelapan faedah daripada deposit 10% tersebut. Dalam penyataan pembelaan dan tuntutan balas, ketujuh-tujuh defendan mengaku bahawa defendan kelapan mewakili mereka di dalam SPA dan bahawa ketujuh-tujuh defendan menerima tawaran yang dibuat oleh plaintif kedua tertakluk kepada pelaksanaan perjanjian formal. Ketujuh-tujuh defendan selanjutnya memplid bahawa perjanjian formal tidak boleh dilaksanakan memandangkan pihak-pihak tidak dapat bersetuju atas terma-terma dan syarat-syarat akhir untuk jual dan beli tanah tersebut. Selepas penyataan tuntutan dipinda, ketujuh-tujuh defendan membuat permohonan untuk meminda penyataan pembelaan dan tuntutan balas, dengan memohon untuk membangkitkan pembelaan tambahan atau alternatif bahawa defendan kelapan, sebagai peguamcara mereka, tidak mempunyai kuasa untuk menerima tawaran plaintif kedua untuk membeli tanah mereka. Persuruhjaya kehakiman yang bijaksana ('PK') mendapati bahawa permohonan oleh ketujuh-tujuh defendan untuk meminda penyataan pembelaan dan tuntutan balas bukan bona fide; akan menukar sifat pembelaan dan ia memprejudis defendan kelapan yang akan didedahkan kepada tindakan untuk kecuaian profesional. Tidak berpuas hati dengan keputusan tersebut, ketujuh-tujuh defendan memfailkan rayuan ini dan menghujah bahawa PK yang bijaksana tersilap apabila tidak membenarkan pemindaan kepada penyataan pembelaan dan tuntutan balas apabila permohonan untuk meminda adalah penting kepada pemindaan yang dibuat oleh plaintif untuk memasukkan plaintif kedua.

Diputuskan, menolak rayuan dengan kos:

(1) Tiada penegasan di dalam afidavit sokongan di mana permohonan dibuat akibat kepada pemindaan penyataan tuntutan tersebut. Kebenaran untuk meminda pliding di bawah A 20 Kaedah-Kaedah Mahkamah 2012 adalah dalam dalam budi bicara hakim yang mana budi bicara mesti dilaksanakan dengan betul. Dalam perkara-perkara yang melibatkan pelaksanaan budi bicara, mahkamah rayuan akan menggunakan anggapan bahawa hakim yang bijaksana telah secara betul melaksanakan budi bicaranya dan bahawa mahkamah rayuan tidak akan campur tangan kecuali ia berpuas hati bahawa budi bicara tersebut telah dilaksanakan atas prinsip-prinsip yang salah atau bahawa terdapat ketidakadilan (lihat perenggan 9 & 11).

(2) PK yang bijaksana telah megggunapakai prinsip-prinsip yang betul dalam melaksanakan budi bicaranya. Yang Arif telah mempertimbangkan soalan-soalan yang relevan dalam mencapai

keputusannya untuk menolak permohonan. Pemindaan tersebut akan menukar sifat pembelaan dan pemindaan yang dicadangkan yang mana adalah berkaitan kesemua perenggan kecuali satu, bukan penting (lihat perenggan 12–13).]

Notes

For cases on amendment, see 2(3) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 6179–6218.

Cases referred to

Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors [1983] 1 MLJ 213, FC (refd)

Legislation referred to

Rules of Court 2012 O 20

Appeal from: Civil No 22–559 of 2010 (High Court, Pulau Pinang)

V Jeya Kumar (K Shanmuga and Aston Paiva with him) (Kanesalingam & Co) for the appellant.
S Bhuvaneswary (Izral Partnership) for the first and second respondents.
PH Cheah (Raja Eleena Siew Ang & Associates) for the third respondent.

Tengku Maimun JCA (delivering judgment of the court):

[1] The appellants are the first to the seventh defendants in the High Court. The first and the second respondents are the plaintiffs. The first respondent is a subsidiary of the second respondent. The second respondent was not originally a party to the suit but was added as the second plaintiff pursuant to an order of the Court of Appeal dated 6 August 2012, allowing the plaintiff's application to amend the statement of claim. In allowing the amendment, the Court of Appeal made an order that parties are at liberty to make consequential amendments arising from the addition of the second plaintiff. The third respondent was the eighth defendant in the court below.

[2] The plaintiffs alleged that the first to the seventh defendants had agreed to sell and the plaintiffs had agreed to purchase certain pieces of lands in the state of Pulau Pinang for a price of RM25,396,613.02. The eighth defendant was the solicitors acting for the first to the seventh defendants in the sale and purchase transaction. The plaintiffs had caused a sum of RM2,539,661.30 being 10% of the purchase price to be deposited with the eighth defendant to be held as stakeholders pending completion of the sale and purchase. Despite the payment of the deposit, the first to the seventh defendants had failed to execute the formal sale and purchase agreement.

[3] The plaintiffs filed a suit in the High Court seeking for a declaration that there is a valid and subsisting contract between the plaintiffs and the first to the seventh defendants for the sale and purchase of the lands; for specific performance of the contract and alternatively for damages for breach of contract in addition to or in lieu of specific performance. As against the eighth defendant, the plaintiffs claim is for an account of the interest of the 10% deposit. Alternatively the plaintiffs' claim against all the defendants is for a declaration that the contract is discharged by reason of its repudiation by the first to the seventh defendants and for the repayment to the plaintiff of the 10% deposit.

[4] In the statement of defence and counterclaim, the first to the seventh defendants admitted that the eighth defendant represented them in the sale and purchase agreement and that the first to the seventh defendants accepted the offer made by the second plaintiff subject to the execution of a formal agreement. The first to the seventh defendants further pleaded that the formal agreement could not be executed as parties could not agree on the final terms and conditions for the sale and purchase of the lands.

[5] After the statement of claim was amended pursuant to the order of the Court of Appeal to add the second plaintiff and after the current solicitors acting for the first to the seventh defendants took over conduct of this matter, the first to the seventh defendants made an application to amend the statement of defence and counterclaim. Vide the amendment, the first to the seventh defendants seek to raise an additional or alternative defence that the eighth defendant, as their solicitors, had no authority to receive and accept the second plaintiff's offer to purchase their land.

[6] The learned judicial commissioner found that the application by the first to the seventh defendants to amend the statement of defence and counterclaim was not bona fide; would change the character of the defence and that it prejudices the eighth defendant who would be exposed to a suit for professional negligence (see para 3.11 of the proposed amended defence). The following are her reasons for dismissing the application:

> (iii) cadangan pindaan tersebut telah mengubah pembelaan asal Defendan 1-7 di mana pengakuan defendan 1-7 yang menerima tawaran dari S.P. Setia (Plaintif 2) tetapi telah ditarik balik dengan memplid perjanjian jual beli tidak pernah dilaksanakan kerana tiada persetujuan berkenaan dengan terma-terma dan syarat perjanjian.
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> (iv) Peranan Defendan 8 sebagai pemegang amanah kepada Defendan 1-7 pada asalnya, kini dipinda dengan memplid Defendan 8 tiada kuasa untuk menerima tawaran bagi pihak Defendan 1-7 dan juga Defendan 8 dikatakan telah salah menasihati Defendan 1-7.

(v) Fakta-fakta lain seperti rundingan-rundingan di antara Plaintif 2 dan Defendan 1-7 mengenai urusan jual beli tanah tersebut sedia diketahui oleh Defendan 1-7 …

(33) Berdasarkan alasan-alasan seperti dinyatakan, Mahkamah ini berpendapat, pindaan-pindaan yang dicadangkan tidak dibuat secara bona fide, sebaliknya adalah percubaan Defendan 1-7 untuk memperbaiki pembelaan Defendan 1-7 yang mana telah memprejudiskan Plaintif 1-2 dan juga Defendan 8. Rujuk kes *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd* dan *Tan Ngu v Seng Tat Properties Sdn Bhd*.

[7] Dissatisfied with the decision, the first to the seventh defendants now appeal to the Court of Appeal.

[8] When the appeal came up before us for hearing, we were informed that by a consent order dated 20 February 2013, the claim against the eighth defendant has been struck out. A copy of the said consent order was produced for our perusal. The result of the consent order was that there are now only seven defendants in the main suit as the eighth defendant was no longer a party.

[9] Insofar as the appeal is concerned, the gist of the submission for the appellants was that the learned judicial commissioner erred in not allowing the amendment to the statement of defence and counterclaim when the application to amend was predominantly consequential to the amendment made by the plaintiff to add the second plaintiff. However, we noted that there is no averment in the affidavit in support that the application is made consequent to the amendment of the statement of claim. The affidavit in support of the amendment affirmed by the seventh defendant states, inter alia:

4. Akan tetapi, apabila peguamcara saya, yang telah mengambil alih tindakan ini bagi pihak saya lebih kurang sebulan yang lalu, meneliti kesemua dokumen dan suratcara, mereka telah menasihati saya dan saya sesungguhnya percaya bahawa kami mempunyai satu pembelaan yang perlu dimasukkan ke dalam Pembelaan.

4.1 Ini adalah pembelaan bahawa Defendan Ke8 nampaknya daripada dokumen dan turutan peristiwa tiada kuasa untuk memasuki satu perjanjian untuk pihak Defendan-defendan Pertama hingga Ke7.

4.2 Peguamcara saya menasihati saya dan saya sesungguhnya percaya juga bahawa terdapat beberapa perkara lagi butir-butir yang perlu diplid untuk menjelaskan fakta-fakta di dalam perkara ini.

4.3 Saya sesungguhnya percaya bahawa kesemua pindaan-pindaan ini berbangkit daripada turutan fakta yang sama atau sebahagian besarnya berbangkit daripada fakta yang sama dan berkenaan dengan relif yang dituntut di dalam tindakan ini …

4.4 …

A 5. Saya dinasihati oleh peguamcara saya dan sesungguhnya percaya bahawa Defendan Ke8 tiada kuasa untuk memasuki perjanjian dengan Plaintif-Plaintif …

[10] As propounded in *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213, leave to amend the pleadings under O 20 of the Rules of Court 2012 is within the discretion of a judge which discretion must be exercised judiciously.

[11] It is a well settled principle that in matters involving the exercise of a discretion, the appellate court will work on the presumption that the learned judge has rightly exercised the discretion and that the appellate court will not interfere unless it is satisfied that the discretion has been exercised on a wrong principle or that there has been a miscarriage of justice.

[12] Having read the grounds of judgment, we are satisfied that the learned judicial commissioner had applied the correct principles in the exercise of her discretion. Her Ladyship had considered the relevant questions as stipulated in *Yamaha Motor*, in coming to her decision to dismiss the application.

[13] We agree with the learned judicial commissioner that the amendment changes the character of the defence and we find that the proposed amendment which was in respect of all the paragraphs except one, was not consequential. We therefore dismissed the appeal with costs and affirmed the order of the High Court. We wish to add that insofar as the eighth defendant was concerned, we were of the view that the circumstances that prevailed consequent to the consent order dated 20 February 2013 renders the proposed amended defence completely incongruous.

Appeal dismissed with costs.

Reported by Afiq Mohamad Noor